United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7267

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY,

Plaintiff-Appellee

v.

CENTRAL VERMONT PUBLIC SERVICE CORP.,
and RUTLAND CABLE TV, INC.,

Defendants,

CENTRAL VERMONT PUBLIC SERVICE CORP.,

Defendant-Appellant

BRIEF OF PLAINTIFF-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

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Plaintiff-Appellee

V.

CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Defendant-Appellant

STATEMENT OF THE CASE

Plaintiff David Sharp commenced suit against New England Telephone and Telegraph Company (Telco) and Osmose Wood Preserving Company (Osmose) on January 21, 1972, for personal injuries incurred when a utility pole, upon which he was working while employed by Central Vermont Public Service Corporation (CV) snapped at its base and fell to the ground. Telco impleaded CV and Rutland Cable TV, Inc. (Cable TV) alleging against CV that Telco was entitled to indemnity on theories of active/passive negligence, CV's breach of express and implied warranty when it sold the accident pole to Telco, and CV's breach of the indemnity provision in Article XIII of the 1929 Agreement between CV and Telco. At CV's instance, the Court severed the third-party action from the primary action.

The primary action of Sharp against Telco and Osmose went to trial by jury on February 11, 1974, Honorable James S. Holden presiding. After three days of litigation that action was dismissed by the Court's February 14, 1974 Order of Dismissal, the Court having been advised that Telco had agreed to pay $50,000 to Sharp under the terms of a Covenant-Not-to-Sue (Plaintiff's Exhibit 12).

The parties stipulated to trial of the third-party action by Court. That trial commenced before Honorable James L. Oakes on February 5, 1975.

This is an appeal by CV from the Order of Judge Oakes granting Telco a judgment against CV for $70,000, plus interest and costs, based upon CV's breach of the indemnity provisions of Article XIII of the 1929 Agreement and dismissing CV's counterclaim against Telco for recovery of workmen's compensation payments and attorneys' fees.

No appeal is taken from Judge Oakes' Order dismissing the Third-Party Complaint against Cable TV.

In presenting this appeal CV does not contest Judge Oakes' findings that CV was negligent and Telco was not negligent but rather it only argues that Judge Oakes wrongfully applied the indemnity provisions to the facts of the case.

STATEMENT OF FACTS

The following excerpt from Judge Oakes' March 14, 1974 Findings of Fact summarizes the relevant facts:

> "David Sharp, an employee of Central Vermont Public Service Corp. (CV), was seriously injured on February 16, 1970, while in the process of doing his work as a third class lineman for CV on a pole owned by New England Telephone & Telegraph Co. (Telco) as a result of the pole's falling. Having climbed the pole, hereinafter designated as X-1, he was pulling up a de-energized primary line being strung from Pole X-1 to a Pole 17, according to testimony of C. William Mulholland who was then working on the ground. Pole X-1 contained near the ground line interior rot which was not visible nor readily detectable either by the eye or by a person with David Sharp's experience using his company-prescribed sounding test, i.e., hitting the pole several times with a wrench or hammer at or near the ground line. Pole X-1 was owned by Telco. Although not using the pole Telco as owner was required under contract to maintain and inspect it. The pole was used by CV and had one Rutland Cable TV (Cable TV) attachment." (page 1-2)

Judge Oakes found that Telco breached its duty under Article VIII(a) of the 1929 Agreement between CV and Telco because Pole X-1 was not in "safe and serviceable condition" at the time of subject accident (No. 14, page 4) but that "(t)here is no evidence in this record, however, that Telco was negligent." (No. 15, page 4)

Judge Oakes further found that CV was negligent at said time (No. 35, page 7) and that "CV's negligence contributed 100 percent to cause the accident." (page 12)

These findings are not challenged by CV and thus, in applying the indemnity provisions of the 1929 Agreement to the applicable facts, it must be borne in mind that CV was 100 percent negligent and that Telco was not negligent.

Judge Oakes concluded that CV was obligated to indemnify Telco pursuant to Article XIII(2) of the 1929 Agreement and accordingly ordered judgment for "Telco against CV for $70,000 together with interest at the legal rate from the time of payment of $50,000 to David Sharp and of $20,000 to Telco, and costs." (page 21)

As indicated, CV prosecutes this appeal solely on the basis of Judge Oakes' interpretation of the indemnity provisions of the 1929 Agreement.

ISSUES

I. Does Article XIII(4) of the 1929 Agreement limit the amount of indemnity to workmen's compensation payments under the circumstances of this case?

II. Should this Court conclude that Article XIII(4) of the 1929 Agreement limits the amount of indemnity to workmen's compensation payments under the circumstances of this case, is CV entitled to attorneys' fees and expenses of litigation?

III. Should this Court conclude that CV was legally obligated to indemnify Telco for the full amount of the damages paid David Sharp, is CV entitled to a set-off of workmen's compensation payments?

I. Telco is entitled to indemnity under the 1929 Agreement

A. The parties ratified Article XIII of the 1929 Agreement after the change in Vermont Workmen's Compensation Law.

The basis for CV's appeal is that Judge Oakes incorrectly interpreted Article XIII of the 1929 Agreement. Judge Oakes decided that the language of Article XIII requires that CV indemnify NET for amounts paid by NET to CV's employee, David Sharp. CV does not challenge Judge Oakes' holding that CV was negligent in failing to provide for Sharp's safety and that this negligence contributed 100 percent to his injuries. Nor does CV contend that the Court was erroneous in its finding that NET was not negligent because NET had followed pole inspection procedures used by utility companies in New England.

CV's position is that the lower Court should have interpreted Article XIII to mean that once it had paid workmen's compensation benefits to its employee it should be, regardless of its negligence, exonerated from having to make indemnity payments to NET. In support of this proposed interpretation of Article XIII, CV references the change in Vermont Workmen's Compensation Law in 1959 and argues that the change in the law created rights which were not contemplated by the parties when the 1929 Agreement was made and that, therefore, the Agreement must be interpreted in light of the pre-1959 statutory change.

The evidence presented during the trial before Judge Oakes clearly indicates that the parties ratified the 1929 Agreement

after the statutory change and fully understood and intended the liability allocation of Article XIII under the new law.

This statutory change in Vermont law removed the employee's acceptance of workmen's compensation benefits from serving as a bar to an employee's civil suit against a third party.[1] Legislative approval of the change occurred on June 9, 1959, as stated in Public Act No. 232, and the new enactment became effective on July 1, 1959, as provided by 1 V.S.A. Section 212[2]. Thereafter, on September 22, 1959, the parties amended Article XIV of the 1929 Agreement with a document marked and admitted as Exhibit 13 (an amendment which is not herein relevant), but, most significantly, Paragraph (b) of Exhibit 13 states that "(i)n all other respects said Agreement dated April 1, 1929, shall continue unaltered."

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[1] 21 V.S.A. 624

Where the injury for which compensation is payable under the provisions of this chapter was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but the injured employee or his personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section...21 V.S.A. 624.

[2] 1 V.S.A. Section 212

Laws enacted by the General Assembly shall take effect on July 1 next following the date of their passage, unless it is otherwise specifically provided.

There is little doubt that the parties, two large utilities, were aware of both the change in the Vermont law and how it would affect the allocation of liability between them under Article XIII. The specific ratification of the 1929 Agreement after the change in the law as well as the parties' failure to modify Article XIII between 1959 and 1970 proves that they were well satisfied with their 1929 Agreement under post-1959 law. If the 1959 change in the law had brought about unforeseen and unintended exposure the parties would have amended Article XIII. Instead they ratified the Agreement and thereby interpreted it within the context of the new statutory law.

A basic precept of contract interpretation is the interpretation placed thereon by the parties, viz:

> "an important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves. The process of practical interpretation and application is a further indication by the parties of the meaning which they have placed upon the terms of the contract which they have made. Courts give great weight to these expressions be they actions or declarations." (footnotes omitted) 4 Williston on Contracts, Section 623.

Since the 1929 Agreement was reaffirmed after the change in the law, it is specious for CV to argue that it has not withstood the test of time. It should be applied and enforced exactly as it reads.

B. The lower Court correctly interpreted Article XIII of the 1929 Agreement.

In his decision Judge Oakes concludes that:

> "While Article XIII(4) is ambiguously drafted in that it does not state whether workmen's compensation

> payments shall on the one hand be the only damages within terms of Paragraph 2 (footnote omitted) or on the other hand be included in Paragraph 2, the interpretation of inclusion is the only one which does not nullify Paragraph 2." (page 16)

The Court recognizes that the word "damages" in Paragraph 4 is on its face ambiguous because it can mean either "all damages indemnifiable under Paragraph 2" or, alternatively, "another category of damages indemnifiable under Paragraph 2." If the former interpretation were adopted then in the instant case CV would be liable to Sharp for workmen's compensation payments but would have no duty to indemnify Telco for any payments made by Telco to Sharp. On the other hand, if the latter interpretation were to be selected, as it was by lower Court, CV would be obligated to indemnify Telco for the full amount paid by Telco to Sharp ($50,000) including attorneys' fees and other expenses listed in Article XIII(6).

The ambiguity referenced by the lower Court is resolved by giving Paragraph 4 "damages" a definition which does not nullify the meaning of "all damages" in Paragraph 2. This method of interpretation is well grounded in case law, both within and outside the State of Vermont. In Breding v. Champlain Marine and Realty Co., 106 Vt. 288, 296, 172 A. 625 (1934), the Court held as follows:

> "In the interpretation of contracts whether they be ambiguous in the sense that that term is here defined or simply certain language of doubtful meaning, the primary concern of the Courts is to ascertain and to give effect to the true intention of the parties. To achieve this object the Courts will examine and consider the entire writing, seeking as best they can

> to harmonize and to give effect to all the provisions of the contract so that none will be rendered meaningless."

The lower Court ruled that to adopt the interpretation that Paragraph 4 was meant to limit the damages in Paragraph 2 to workmen's compensation payments would in effect nullify Paragraph 2:

> "If workmen's compensation were the sole measure of indemnity damages the phrase "liable for all damages for such injuries (emphasis added) would have no effect since damage from injury can clearly exceed the limits of workmen's compensation." (pages 16-17)

Paragraph 2 damages can clearly exceed workmen's compensation payments because Paragraph 6[3] reads that "damages" include the "amounts paid to the claimant" and these amounts undisputably include civil suit awards and amounts paid to a claimant under a Covenant-Not-to-Sue.

In support of the lower Court's analysis, if Paragraph 4 were written to limit Paragraph 2 "damages" to workmen's compensation payments Paragraph 2 would not have included the term "all damages" or, Paragraph 4 would have read "all damages" rather than "damages" alone. In summary, the fact that the word "all" is used in Paragraph 2 but not in Paragraph 4

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[3]Article XIII(6)

> In the adjustment between the parties hereto of any claim for damages arising hereunder, the liability assumed hereunder, by the parties shall include, in addition to the amounts paid to the claimant, all expenses incurred by the parties in connection therewith, which shall comprise costs, attorneys' fees, disbursements and other proper charges and expenditures.

indicates an intent to make Paragraph 2 damages encompass all kinds of indemnifiable damages with Paragraph 4 stating two types of damages to be included within the scope of damages in Paragraph 2.[4] The two types of indemnifiable damages in Paragraph 4 are workmen's compensation payments and payments under any employee disability or death plan.

Moreover, if Paragraph 4 were limitative, it would be written to more clearly express this purpose with such language as "the only damages", "all damages" as mentioned above, or "when workmen's compensation or employment disability payments are made, these shall be the only damages indemnifiable under Paragraphs 1 and 2."

CV argues in its Brief that under the Court's interpretation Article XIII(4) "is meaningless and becomes mere surplusage" (page 16 of CV's Brief). On the contrary, Paragraph 4

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[4]Article XIII(2)

> Where, on account of injuries of the character described in the preceding paragraphs of this article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with (1) the provision of any workmen's compensation act or any act creating a liability in the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of the employment, whether based on negligence on the part of the employer or not, or (2) any plan for employees' disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them, such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

expresses the specific intent to have workmen's compensation payments and employee disability benefits or death benefits included within the damages allocation between the parties in the 1929 Agreement. Without Paragraph 4, Article XIII would be ambiguous on the issue of whether payments made as the result of the employer/employee relationship should be included within the liability allocation of Article XIII.

C. The lower Court's interpretation of Article XIII gives effect to the parties' intent in 1929.

1. The parties' intent in 1929 is clearly expressed in the language of Article XIII.

To resolve ambiguities in a contract the Courts "will examine the circumstances as they existed at the time of the execution of the instrument to determine the parties' contractual intent. Rhinehart v. Southern Pacific Company, 38 F. Supp. 76, 79 (D.C. Calif. 1941); H. P. Hood v. Heins, 124 Vt. 331, 336, 205 A.2d 561 (1964). However, this interpretational device will not be employed if the intent of the parties can be discerned from the language of the contract itself. In Cross-Abbott Company v. Howard, Inc., 124 Vt. 439, 441, 207 A.2d 134 (1964) the Court held,

> ...if the language of the instrument is clear and unambiguous its intent cannot be altered by evidence of extraneous circumstances; and in such situation the instrument is to be interpreted by its own language, and the understanding of the parties must be deemed to be that which their own instrument declares. (cites omitted)

In the instant case the ambiguity of Paragraph 4 "damages" can be removed by interpreting the word within the context of

Paragraph 2 as was done by the lower Court. Any confusion as to the parties' intent regarding Paragraph 4 can be resolved from the language in the Agreement itself without reference to the circumstances that existed in 1929. Judge Oakes acknowledged that "the parties contracted having the Workmen's Compensation Act in mind as demonstrated by the specific language of Article XIII(4) of the April 1, 1929, Agreement" (page 16). But he justifiably did not attempt to reconstruct the parties' 1929 intent in light of the then existing Vermont Workmen's Compensation Law because the plain meaning of the Agreement on its face speaks their purpose, both in 1970, when the Sharp accident occurred, and in 1929.

2. In 1929 the parties drafted Article XIII to account for possible changes in Vermont Workmen's Compensation Law.

The crux of CV's argument in Point I of its Brief is that the ambiguity of Paragraph 4 "damages" can only be clarified by understanding the purpose that the parties intended to achieve under the then existing Vermont Workmen's Compensation Law by including Paragraph 4 in Article XIII. This argument is contingent upon the assumption that the parties did not foresee the possibility of change in the statutory law but prepared the Agreement so that it would be interpreted within the context of the 1929 law.

However, Paragraph 4 was not so narrowly drawn. It reveals an awareness of possible changes in the law and denotes a specific intent to have Article XIII liability allocation apply

regardless of any statutory change unless, of course, the Agreement were modified by the parties. Paragraph 4 states that damages shall include payments made in conformity with "(1) the provision of any workmen's compensation act or any act creating a liability on the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of employment, whether based on negligence on the part of the employer or not or (2) any plan for employee's disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them." (underlining added)

References are to "any" act, not the one then in effect, and to an act "based on negligence on the part of the employer" although 1929 Vermont workmen's compensation payments were not based upon the employer's negligence. Payments under future employee plans were also included within Paragraph 2 damages. If the parties had intended to have their contract solely interpreted within the context of the circumstances in 1929 they would have more specifically described the statutory law and the employee plan which the Agreement was to incorporate.

3. The lower Court's interpretation of Article XIII (4) is consistent with the intent expressed in the other paragraphs of Article XIII.

Article XIII expresses a clear intent to allocate all liability to the employer for injuries to its own employees except when the other party's negligence is the sole cause of injury. The parties distinguish between their own employees and "persons other than employees." In regard to other persons,

the parties agree to share the damages if there is concurrent liability but damages arising from employee injuries are to be paid by the employer unless the negligence of the other party is the sole cause. If, for example, the non-employer's negligence is only one causative factor for an employee's injury, the employer will pay all damages despite the fact that the employer's actions may not have been the other concurrent cause.

The above-mentioned intent reflects an economic consideration that one would expect between two large utilities: to make the employer ultimately responsible for its own employees' safety except in those situations when the other party is completely to blame. The lower Court's interpretation of Paragraph 4 "damages" is consistent with the paternalistic relationship between an employer and employee voiced by the other paragraphs in Article XIII. The payment of workmen's compensation under this interpretation does not serve to bar further liability by the employer for damages that the non-employer may incur in a civil suit brought by the former's employee.

II. CV is not entitled to attorneys' fees and expenses of litigation

CV concludes its Brief with a request for attorneys' fees and expenses of litigation in the amount of $7,250, plus interest. Even if the Court were to decide that CV was not liable to Telco on the theory that its only obligation was

to pay workmen's compensation benefits to Sharp, CV would not be entitled to legal fees and expenses under the 1929 Agreement since Article XIII does not provide for indemnity of damages under Paragraph 2 or indemnity of other expenses under Paragraph 6 unless the non-employer's negligence is the sole cause of injury to an employee. The lower Court found that "CV was negligent and that its negligence contributed 100 percent to cause the accident" (page 12) and CV has not challenged this finding in its appeal. Nor is CV entitled to payment for attorneys' fees and expenses of litigation under the common law. Davidson v. Davidson, 111 Vt. 68, 10 A.2d 197 (1940); 20 Am. Jur. 2nd Costs Section 72.

III. CV is not entitled to a set-off for workmen's compensation payments

CV claims that if Telco prevails on Point I (above) CV is entitled, pursuant to Article XIII of the 1929 Agreement and 21 V.S.A. Section 624, to a set-off of $8,000 for workmen's compensation payments made to Sharp.

Under Paragraph XIII CV is not entitled to a set-off because, as Judge Oakes ruled,

> "In addition, although Article XIII(4) implies that workmen's compensation payments are Article XIII(2) damages, it does not mean that Telco must bear the cost of the workmen's compensation when it is entitled to indemnification. Rather, it means that damages to Sharp are $58,000. (page 18)[5]

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[5] This excerpt was misquoted in CV's Brief on page 20.

This interpretation is correct because under Article XIII(6) damages are defined as "amounts paid to the claimant" and the amounts paid to Sharp are both workmen's compensation payments and the payments made by Telco pursuant to the February 14, 1974 Covenant-Not-to-Sue between Sharp and Telco (Plaintiff's Exhibit 12).

CV contends that Paragraph 2 damages should be defined as "a fair estimate of the value of damages" as determined by Telco and Sharp under the Covenant-Not-to-Sue (pages 20-21 of CV's Brief). In response, the 1929 Agreement does not define Paragraph 2 damages as requested by CV but as "amounts paid to the claimant" (paragraph 6, underlining added). If Paragraph 2 were defined according to CV's interpretation, Telco, a non-negligent, non-employer, would be compelled to pay $8,000 to Sharp because it would be indemnified only $42,000 by CV, a result not provided by Paragraph 2 which specifically states that the negligent employer shall pay all damages. Moreover, Telco's payment of $50,000 was based upon not "a fair estimate of the value of the damages" but upon a fair estimate of the value of Sharp's claim against Telco.[6] It is

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[6] The seventh unnumbered paragraph of the aforementioned Covenant-Not-to-Sue reads: Whereas, in negotiations the parties litigant recognize that David Sharp's damage claim was such that but for the liability dispute, his claim against NET would have had a value substantially in excess of $50,000. (underlining added)

this latter amount, plus costs and attorneys' fees, which the lower Court awarded to Telco pursuant to Article XIII.

As for CV's claim for a set-off pursuant to 21 V.S.A. 624, one issue raised by the lower Court is whether the employer's subrogation claim against a third party for workmen's compensation paid to one employee is barred by the negligence of his co-employee. Although the Vermont Supreme Court has never ruled on this question, the lower Court decided that under Vermont law the co-employee's negligence would be a defense to the employer's subrogation claim because "the wrongdoer is not entitled to a credit for compensation payments from outside sources against the damages he brought about," Dubie v. Cass-Warner Corp., 125 Vt. 476, 218 A.2d 694 (1966). While Dubie held that a defendant could not receive a credit for workmen's compensation payments made by the plaintiff's employer, Judge Oakes reasoned that the principle of Dubie would apply to the specific issue in the instant case.

In support of the lower Court's decision, and cited therein, is Witt v. Jackson, 57 Cal.2d 57, 366 Pac.2d 641 (1961). In that case an employer argued that the negligence of its employee (Witt) was not a defense to its cause of action to recover the amount it paid a second employee (Grossman) in workmen's compensation. Witt and Grossman, both police officers, were in a police cruiser when Grossman, riding as a passenger, was injured as a result of a collision between

the cruiser, being operated by Witt, and another car. In the employer's action for workmen's compensation payments against the driver of the other car, the Court decided to accept the reasons in support of the North Carolina rule[7] that

> "the third party is entitled to have the judgment against him reduced by the amount of compensation paid to the injured employee if he can prove that the concurrent negligence of the employer contributed to the injuries suffered by the employee." id at 649.

The California Court held as follows:

> "This policy should prevail here since there is nothing in the Labor Code to suggest that the Legislature contemplated that a negligent employer could take advantage of the reimbursement remedies that those sections provide. In the absence of express terms to the contrary, these provisions must be deemed to be qualified by Civil Code, Section 3517 which provides that "no one can take advantage of his own wrong." Thus, whether an action is brought by the employer or the employee, the third party tortfeasor should be able to invoke the concurrent negligence of the employer to defeat its right to reimbursement, since, in either event, the action is brought for the benefit of the employer to the extent that compensation benefits have been paid to the employee." id at 649.

There is no basis in the contract or general law to support CV's claim that it is entitled to an $8,000 set-off.

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[7] Brown v. Southern Ry. Co., 204 N.C. 668, 169 S.E. 419 (1933); Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220, 225 (1951); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886, 892 (1953).

CONCLUSION

For the foregoing reasons, the Judgment of the lower Court should be sustained.

Dated: August 26, 1975

Respectfully submitted,

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